



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 596 OF 2009

FLEUR INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

PERMANENT SECRETARY

MINISTRY OF ROADS.....1ST DEFENDANT

MINISTRY OF ROADS.....2ND DEFENDANT

(BY WAY OF SUIT BY COUNTER-CLAIM)

VERSUS

ATTORNEY GENERAL.....1ST PLAINTIFF

PERMANENT SECRETARY MINISTRY OF ROADS.....2ND PLAINTIFF

=VERSUS=

WILSON GACHANJA.....1ST DEFENDANT

ADEITA COMPANY LIMITED.....2ND DEFENDANT

FLEUR INVESTMENTS LIMITED.....3RD DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 11th March 2012 in which the Plaintiff in the main suit who is also the 3rd Defendant in the counter-claim (Applicant) seeks the admission of the written statement of Dr. Kioko Mang'eli now deceased which was recorded on 29th October 2018. Dr. Kioko Mang'eli who was a well renowned engineer in matters concerning technology died on 14th March 2019.

2. The Applicant had contracted Dr. Kioko Mang'eli to install Very Small Aperture Terminal (VSAT) on its building which was erected on LR Nos.25535/1 and LR No. 25535/2 which was along Thika Road. The Applicant's building was demolished by the officials of the Ministry of Roads in 2008 and the said demolition is the subject of this suit.

3. The Applicant contends that as Dr. Kioko Mangeli's statement was recorded in the course of his professional duty and now that he is dead, his statement should be admitted as part of the evidence of the Applicant under section 33 (b) of the Evidence Act. The Applicant argues that Dr. Mangeli's evidence is admissible under section 35 of the Evidence Act as his statement concerns matters on which his direct oral evidence was admissible; the statement was made on matters which he had personal knowledge; the statement was signed by himself; he had no personal interest in the dispute before court; that his statement was on matters concerning the work he did as a professional and that he is now deceased.

4. The Applicant further contends that Dr. Kioko Mang'eli had to establish the boundaries of the Applicant's properties before installing the

VSAT and that his evidence is critical to the Applicant's case. It is on this basis that the Applicant seeks admission of the evidence of Dr. Kioko Mang'eli.

5. The Applicant's application was opposed by the Attorney General who is the 1st Defendant in the main suit and the Plaintiff in the counter-claim (Respondent) through grounds of opposition dated 15th March 2021. The Respondent contends that the Applicant's application does not meet the mandatory requirements of section 33(b) of the Evidence Act; that the evidence which is sought to be admitted is hearsay evidence which will not be subjected to cross-examination and therefore a violation of Article 50 of the constitution ; that the Applicant should have opted to substitute the evidence of Dr Kioko Mang'eli with that of another expert witness in the same field and that the admission of Dr. Kioko Mang'eli's evidence will be prejudicial to the Respondent's case as it will not be subject to cross-examination where it would have been tested.

6. The Court directed the parties herein to put in written submissions in respect of the Applicant's application. The Applicant filed written submissions dated 23rd March 2021 and supplementary submissions dated 26th April 2021. The Respondent filed submissions dated 14th April 2021. I have carefully considered the submissions by the Applicant and those of the Respondent together with the accompanying authorities. The only issue for determination is whether the Applicant has met the threshold set out under section 33(b) of the Evidence Act and the attendant admissibility test as contained in section 35 of the Evidence Act to warrant its admission.

7. In the instant case, we are dealing with a statement which was recorded by a person who cannot be called as a witness on the ground that he is dead. The relevant requirements under section 33 (b) of the Evidence Act is that such statement has to be in writing; that the statement must contain admissible facts made by the deceased; that the statement was made in the ordinary course of business or in the discharge of professional duty.

8. There is no contention that Dr Kioko Mang'eli is deceased. Prior to the demise of the deceased, he had recorded a written statement which he himself signed. The statement contains what the deceased did upon being contracted by the Applicant to install VSAT on its properties which have since been demolished. The deceased was contracted to install the VSAT because he was knowledgeable in matters to do with technology. By installing the VSAT system, the deceased was discharging his professional duties.

9. It is clear from the statement by Dr Kioko Mang'eli that he was the one involved in the installation of the VSAT. Before he installed the system, he ascertained the boundaries of the properties owned by the Applicant. He did this with the assistance of a re registered physical planner David N Gichohi who is also deceased. When the building belonging to the Applicant was being demolished, he was informed and he drove to the scene where he tried to persuade those demolishing the building to allow him to dismantle the VSAT which he had installed but the demolishers would hear none of that.

10. Dr Kioko Mang'eli's statement contains what he did himself. He installed the VSAT in the course of his professional duty as an engineer. Such evidence is admissible under section 35 of the Evidence Act. The statement does not contain hearsay evidence as contended by the Respondent. His evidence was recorded and his statement was served upon all the parties to this case prior to his death. There is no evidence to suggest that he had any interest in the subject matter of this suit.

11. The Respondent argued that Dr Kioko's evidence should have been substituted by another expert witness. Whereas this may be so in certain circumstances, the statement of Dr Kioko Mang'eli has met all the requirements under section 33 (b) that is as regards non availability to testify, admissibility and the manner in which it was recorded i.e in the course of his professional duty. A substitution of Dr Kioko Mang'eli's statement with another expert would simply not work as that witness would not know what had been installed and the extent of the boundaries of the Applicant's land or even the exact location of the equipment installed.

12. The Respondent's fear of prejudice on ground that he will not have an opportunity to cross-examine will be minimized through submissions as was held in the case of **Ngoiwa Company Limited Vs Dorcas Wanjiku 1kinu (2018) eKLR**. This court will also determine the extent and weight to attach to that evidence during the Judgement as there will be no opportunity to test the same in cross-examination.

13. Having found that the statement of Dr Kioko Mang'eli has met all the requirements under Section 33 (b) of the Evidence Act. I find that his statement should be admitted as part of the Applicant's evidence under Section 33 (b) of the Evidence Act. I therefore allow the Applicant's application with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Kamau for Defendant in main suit and Plaintiff in counter-claim

Mr Ngatia and M/s Cherotich for Plaintiff in main suit and 3rd Defendant in counter claim.

Mr Ouma for 1st Defendant

Mr Mshweshwe for 1st Defendant in the counter-claim

Court Assistant: Okumu

E. O.OBAGA

JUDGE